

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

EX PARTE COMMUNICATIONS

Docket No. RM2016-4

**UNITED STATES POSTAL SERVICE COMMENTS
ON PROPOSED EX PARTE COMMUNICATIONS RULES**
(February 29, 2016)

Pursuant to Order No. 3005,¹ the United States Postal Service (Postal Service) hereby submits its initial comments on the Commission's proposed rules regarding ex parte communications.

BACKGROUND

On January 8, 2016, the Commission issued Order No. 3005, proposing to amend existing rules concerning "ex parte" communications between Commission decision-making personnel and the Postal Service or public stakeholders in matters before the Commission. According to Order No. 3005, the proposed rules are intended (1) to remove provisions no longer applicable under the Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3218 (2006); (2) to reorganize the rules for clarity; and (3) to adopt an approach to agency treatment of ex parte communications that is consistent with Recommendation 2014-4 of the Administrative Conference of the United States (ACUS).²

¹ Order No. 3005, Notice of Proposed Rulemaking Regarding Ex Parte Communications, PRC Docket No. RM2016-4 (Jan. 8, 2016).

² Administrative Conference of the United States, Administrative Conference Recommendation 2014-4, June 6, 2014 [hereinafter "Recommendation 2014-4"].

Concurrent with its issuance of Order No. 3005, the Commission announced the filing of a new internal Commission policy on ex parte communications that will be referenced in its proposed 39 C.F.R. part 3000, subpart B.³ In Order No. 3005, the Commission invited comment on both the proposed new rules and the proposed internal PRC Policy.

INTRODUCTION

The Postal Service strongly supports the principles of transparency and fairness the proposed rules and policy are intended to promote, and it appreciates the Commission's efforts in seeking to ensure that Commission practices and procedures comport with those principles.

The all-encompassing scope of the proposed rules, however, goes far beyond the clear direction provided in ACUS Recommendation 2014-4 in a way that is likely to chill healthy and productive communications between the Commission, the Postal Service and other public stakeholders. The open-ended and vague definitions in the proposed regulations, which are clarified only in the internal PRC Policy, fail to provide fair notice of when the restrictions will apply and raise concerns that material, substantive changes that would not be subject to public review or comment could be made in the future. Finally, the proposed rulemaking deviates from specific guidance points set forth in Recommendation 2014-4 (such as provision of a mechanism for protecting confidential information) that would help ensure successful implementation of the rules consistent with their underlying policy objectives. Further discussion of these

³ PRC Policy: Ex Parte Communications, PRC-LR-RM2016-4/1, PRC Docket No. RM2016-4 (Jan. 8, 2016) [hereinafter "PRC Policy"].

points follows below, along with the Postal Service’s suggested revisions to the text of the proposed rules.

ANALYSIS

I. The Proposed Rules Are Overly Broad and Risk Chilling Legitimate Communications Between the Commission and the Postal Community.

A. The Very Concept of “Ex Parte Communications” Does Not Fit the Context of Most Commission Proceeding Types.

It’s a well-established principle that, absent unusual circumstances, a party should not have private, “ex parte” contacts with the judge in a typical civil or criminal court case. Procedural and ethical rules prohibiting ex parte communications – that is, communications “on or from one side or party only” – are designed to ensure that all parties to an adversarial proceeding are aware of (and have an opportunity to contest) assertions made to an adjudicator that may form a basis for decision in a contested matter.⁴

Where, on the other hand, an agency’s decision-making involves “informal rulemaking of a policymaking sort,” the rationale underlying the concept of ex parte contacts “is of more questionable utility.”⁵ The APA, which expressly prohibits ex parte communications in *formal* rulemakings and adjudications, is silent on how such communications should be treated in *informal* rulemakings.⁶ In the seminal *Sierra Club* case, the U.S. Court of Appeals for the District of Columbia Circuit found the APA’s silence indicative of congressional intent:

⁴ See Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking* (2014), at 8-10 [hereinafter “Sferra-Bonistalli Report”].

⁵ *Id.* at 35 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981)).

⁶ Compare 5 U.S.C. § 557(d)(1) (prohibiting ex parte communications) with *id.* § 553 (containing no such prohibition).

If Congress wanted to forbid or limit ex parte contact in every case of informal rulemaking, it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act. . . . That it did not extend the ex parte contact provisions of the amended section 557 to section 553 even though such an extension was urged upon it during the hearing is a sound indication that Congress still does not favor a per se prohibition or even a “logging” requirement in all such proceedings.⁷

Some commentators have even questioned whether the term “ex parte” should be used in the informal rulemaking context at all.⁸

In most Commission docket types, and as described in its recent Mission Statement, the Commission serves in a policymaking capacity whereby it seeks to “ensure transparency and accountability of the United States Postal Service and foster a vital and efficient universal mail system.”⁹ While some Commission proceedings by their nature place the Commission in a judicial or quasi-judicial role (e.g., complaint cases or Post Office closing appeals), most require the Commission only to act in its oversight capacity as a regulator of the Postal Service. In those latter proceedings, certain Postal Service proposals, decisions and actions are evaluated for consistency with the underlying statutory framework. While they may at times become the subject of disputes on particular points (and in some cases, third parties may even intervene formally), these proceedings do not involve the “conflicting private claims to a valuable privilege” that are often cited as the rationale for prohibiting ex parte communications in

⁷ *Sierra Club*, 657 F.2d at 401-402 (quoting *Action for Children’s Television v. FCC*, 564 F.2d 458, 474 & n. 28 (D.C. Cir. 1977)). See also Richard J. Pierce, Jr., *Federal Energy Regulatory Commission Ex Parte Regulations and Practices* (2006), at 2 (“The drafters of the APA also recognized . . . that many types of agency proceedings are not analogous to a judicial trial and that a ban on ex parte communications would make no sense in the context of those types of agency proceedings.”).

⁸ See Sferra-Bonistalli Report at 8-9.

⁹ Postal Regulatory Commission, *Annual Report to the President and Congress, Fiscal Year 2015* (2016), at 3.

a particular contested matter.¹⁰ Instead, the Postal Service is provided with an opportunity to present its views, a Public Representative selected by the Commission participates as an advocate for the public interest, and the Commission acts as decision-maker in its oversight role.

It is in this Commission-specific context that any further restrictions on ex parte communications must be evaluated.

B. The All-Encompassing Scope of the Proposed Rules is Inconsistent with Recommendation 2014-4 and Sound Agency Decision-making.

In stating its objectives for the proposed rulemaking, the Commission acknowledges that it is statutorily required to restrict ex parte communications only in matters that require the opportunity for a hearing on the record under the APA, 5 U.S.C. §§ 556-557: namely, nature of postal service change (or “N” docket) cases initiated pursuant to 39 U.S.C. § 3661.¹¹ In addition, under existing regulations, the Commission already restricts ex parte communications in post office appeal or “A” cases under 39 U.S.C. § 404(d)(5)-(6) and complaint or “C” cases under 39 U.S.C. § 3662.¹² The Postal Service does not take issue with the continued application of restrictions on ex parte communications in these types of proceedings. However, the Commission’s proposed rulemaking goes much further. Citing the principles underlying ex parte restrictions discussed in Recommendation 2014-4, the Commission inexplicably concludes that “all proceedings before the Commission should be treated the same,”¹³

¹⁰ See, e.g., *Sierra Club*, 657 F.2d at 400 (citations omitted).

¹¹ Order No. 3005 at 2.

¹² *Id.*

¹³ *Id.* at 3.

and elects to “self-impose” a prohibition against ex parte communications in all or virtually all Commission docket types.¹⁴

The Commission’s conclusion finds no support in the ACUS Recommendation. Recommendation 2014-4, upon which the Commission relies, focuses on best practices for agency treatment of ex parte communications in informal rulemaking proceedings conducted under section 4 of the APA, 5 U.S.C. § 553.¹⁵ It does not propose that agencies prohibit such communications entirely, however, for reasons clearly articulated in the Recommendation itself. Informal, off-the-record communications can “facilitate a more candid and potentially interactive dialogue of key issues,” serve as an “indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies,” and “help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.”¹⁶

Several federal agencies have crafted ex parte rules that either explicitly or implicitly recognize these benefits in the context of informal rulemaking. For example, the Department of Justice (DOJ) rule states as follows:

A general prohibition . . . against the receipt of private, *ex parte* oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.¹⁷

¹⁴ PRC Policy at 9.

¹⁵ Recommendation 2014-4 at 1, 4.

¹⁶ *Id.* at 2-3.

¹⁷ 28 C.F.R. § 50.17(a) (emphasis in original).

The DOJ rule therefore permits *ex parte* communications in informal rulemakings, subject to a disclosure requirement.¹⁸ The Federal Communications Commission (FCC) takes a similar approach, classifying informal rulemakings as “permit-but-disclose” proceedings in which *ex parte* communications are allowed but must be disclosed after the fact.¹⁹ Finally, the Federal Energy Regulatory Commission (FERC) limits application of its *ex parte* rules to “contested on-the-record proceedings,” *e.g.*, those in which the parties or intervenors dispute a material issue in the proceeding.²⁰ Responding to comments that had been submitted in a rulemaking proceeding, suggesting that all docketed matters automatically should be subject to the same *ex parte* prohibitions, the FERC concluded that such a result “is too restrictive and is not required by law.”²¹

In short, as explained by the U.S. Court of Appeals for the District of Columbia Circuit in *Sierra Club*, “the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated.”²² Those same principles weigh against the Commission’s decision, reflected in the PRC Policy, to “self-impose” an automatic prohibition against *ex parte* communications across all or virtually all Commission docket types.

¹⁸ 28 C.F.R. § 50.17(b)-(c).

¹⁹ See 47 C.F.R. § 1.1206. See also Sferra-Bonistalli Report at 42-45 (describing history and substance of FCC rules addressing *ex parte* communications in informal rulemaking proceedings).

²⁰ 18 C.F.R. § 385.2201.

²¹ Order No. 607, Regulations Governing Off-the-Record Communications, Docket No. RM98-1-000 (Fed. Energy Regulatory Comm’n, Sept. 15, 1999), at 46-47.

²² *Sierra Club*, 657 F.2d at 401 (evaluating the EPA’s consideration of *ex parte* communications in an informal rulemaking under the Clean Air Act) (quoted in Sferra-Bonistalli Report at 16).

II. The Proposed Rules Impermissibly Leave Key Provisions Vague or Undefined.

It is beyond doubt that “regulated parties should know what is required of them so they may act accordingly.”²³ Order No. 3005 does not provide such clear guidance. Instead, the Commission’s vague, open-ended proposed rules tell the public only that application of ex parte communications restrictions to a particular matter will be entirely up to the Commission’s discretion. Then, the more detailed, prescriptive *internal* PRC Policy tells Commission employees that, in fact, ex parte restrictions should be imposed in every single docketed proceeding (unless the Commission decides otherwise on a case-by-case basis). As noted herein, the Postal Service believes that the approach the Commission is pursuing is overly restrictive. However, whatever approach the Commission ultimately decides to take should be fully reflected in its final rules.

A. The Proposed Rules Fail to Provide Reasonable Notice of the Types of Proceedings to which Ex Parte Restrictions Will Apply.

As noted above, the Proposed Rules apply to the three categories of proceedings in which ex parte communications are already restricted by statute or regulation, as well as to a new, “catch-all” category: “Any other matter in which the Commission, in its discretion, determines that it is appropriate to apply the rules of this section.”²⁴ While Proposed Rule 3008.1 does not specify the types of proceedings that could be included in this new catch-all provision, the internal PRC Policy states that the range of proceedings includes all of the following docket types:

- ACR (Annual Compliance Reports);
- CP (Competitive Products);
- MC (Mail Classification);

²³ *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307, 2317 (2012) (holding that a Federal Communications Commission rule regarding indecent broadcasts was unconstitutionally vague).

²⁴ Proposed Rule 3008.1(e).

- MT (Market Tests);
- PI (Public Inquiry);
- R (Rate/Request);
- RM (Rulemaking); and
- T (Tax Computation).²⁵

For these additional docket types where the Commission has “self-imposed” a prohibition against ex parte communications, the internal PRC Policy notes that the Commission reserves the right to adjust policy on a case-by-case basis.²⁶

The net result of this regulatory structure is uncertainty. The regulations that will form a part of the Commission's official rules of practice and procedure, applicable to all parties appearing before the Commission, do not provide adequate notice of the types or categories of proceedings in which ex parte restrictions will be imposed. It is only in the internal PRC Policy – which, presumably, is subject to change at any time without notice or an opportunity for public comment – where the proceeding types are further defined. And even there, Commission employees are told only that they may adjust the policy in specific matters “where warranted.”²⁷ There is no explanation as to when it might be “warranted” and therefore appropriate for the Commission to change the default rule and permit ex parte communications in a particular matter. For the reasons noted above in Section I.B., the Postal Service does not support a new, blanket prohibition against ex parte communications in Commission docket types beyond the three already covered by existing rules. At a minimum, however, parties and participants in Commission proceedings are entitled to more certainty before they initiate contact with the Commission or respond to a Commission request for contact.

²⁵ PRC Policy at 9.

²⁶ *Id.*

²⁷ *Id.* at 7.

To address these concerns, the Postal Service recommends that Proposed Rules 3000.735-501 and 3008.1 be modified in several respects. First, ex parte communications should only be prohibited in “contested proceedings” where there are material issues in dispute (following the FERC approach). Second, the Commission’s decision to apply the restrictions to a particular proceeding should not be automatic, but instead based on specific criteria that would warrant limitations in a particular proceeding (e.g., considerations of fairness among adverse parties, as in the DOJ rule). Third, the Commission should provide notice on the public record of a proceeding when it determines that the ex parte rules will apply to that proceeding. Specific proposed language is included in Appendix A to these Comments.

B. The Proposed Definition of “Ex Parte Communication” Should Exempt Any Communication Types the Commission Will Continue to Allow.

The Commission’s treatment of certain off-the-record communications between the Commission and the Postal Service creates similar uncertainty. The Proposed Rules list several exceptions to the definition of an “ex parte communication”:

- (1) Documents filed using the Commission’s docketing system;
- (2) Communications during the course of Commission meetings or hearings, or other widely publicized events where the Commission provides advance public notice of the event indicating the matter to be discussed, the event is open to all persons participating in the matter before the Commission, and a summary of the event is provided for the record;
- (3) Communications during the course of off-the-record technical conferences associated with a matter before the Commission, or the pre-filing conference for nature of service cases required by § 3001.81 of this chapter, where advance public notice of the event is provided indicating the matter to be discussed, and the event is open to persons participating in the matter before the Commission;
- (4) Questions concerning Commission procedures, the status of a matter before the Commission, or the procedural schedule of a pending matter, where these issues are not contested matters before the Commission; and

(5) Communications not material to the matter before the Commission.²⁸

In its internal policy, the Commission then identifies several additional categories of communications that warrant “special consideration” under the proposed new rules:

- A. Consultations between the Commission and the Postal Service;
- B. Briefings by the Postal Service to the Commission;
- C. Internal case specific Commission briefings; and
- D. Technical conferences.²⁹

As to most of these categories, the PRC Policy states that the new ex parte rules will operate to restrict the scope of the communications and may require disclosures after the fact, but will not prohibit the communications from taking place altogether. When viewed in the context of the default rule articulated in the policy, however – a blanket prohibition against ex parte communications in all or virtually all docket types, unless the Commission decides otherwise in a particular case – there is substantial potential for confusion as to which communications are and are not permitted.

Consider, for example, the internal policy’s reference to Consultations between the Commission and the Postal Service in which “information of interest concerning the operations of both organizations” might be discussed.³⁰ The policy states that these Consultations may include reporting on the status of major initiatives within each organization, typically involve two-way conversations between the entities at the highest organizational levels, and are not open to the public. While they are not prohibited outright, in any such Consultations, no pending matters before the Commission (or

²⁸ Proposed Rule 3008.2(b).

²⁹ PRC Policy at 12-14. The “Technical Conferences” referred to in the PRC Policy appear to be the same as those referenced in Proposed Rule 3008.2(b)(3) as a category excluded from the definition of “ex parte communications.”

³⁰ *Id.* at 13.

anticipated nature of postal services, Post Office appeal, or complaint cases) should be discussed, no deliberations or decisional discussions should take place, and public notice of the Consultations should be made following the session.³¹

Similarly, the internal policy allows periodic “Briefings,” in which the Postal Service briefs the Commission on certain matters of interest “to provide the Commission with a more in depth understanding of specific subject matter,” provided that no pending matters before the Commission (or anticipated nature of postal services, Post Office appeal, or complaint cases) are discussed and no deliberations or decisional discussions take place.³²

Given the broad scope and intended application of the ex parte restrictions to all or virtually all Commission docket types, it is easy to imagine situations in which a Postal Service officer or employee who has been invited by the Commission to participate in a “Consultation” or “Briefing” is unsure what rules will apply to that communication, and which topics are off-limits. A likely result will be to chill the open exchange of timely, relevant information that such communications are intended to promote.

In this context, it is noteworthy that Recommendation 2014-4 does not call for *any* limitations on ex parte communications before initiation of an informal rulemaking proceeding (that is, before a notice of proposed rulemaking (NPRM) is issued), when an agency is in information-gathering mode. In fact, it specifically recommends that

³¹ *Id.* The PRC Policy does not describe the content of the public notice, such as whether it will include substantive information about the topics discussed or simply a statement of fact that a consultation occurred.

³² *Id.*

agencies *not* impose such restrictions.³³ By contrast, the Commission's proposed rules are drafted in such a way that the equivalent of a pre-NPRM communication – one that would otherwise be entirely appropriate and desirable – is discouraged, if not outright prohibited.

Consideration of certain hypothetical communications between the Postal Service and the Commission further illustrates why the Postal Service believes the broad, vaguely defined expansion of the ex parte rules proposed by the Commission in Order No. 3005 is inadvisable. For example, suppose that an analyst at the Commission has a question about a single line item in a non-public folder that the Postal Service filed in an ACR proceeding. The question is technical in nature (having to do with the analyst's understanding of a term used in the spreadsheet) and could be easily answered by Postal Service staff via phone or email. If the analyst misunderstands the use of the term in the spreadsheet, the misunderstanding could have a substantive impact on her analysis of the spreadsheet and waste valuable time and resources if her analysis might ultimately need to be redone. Must she submit her question as part of a formal Chairman's Information Request on the public record, or can she contact the individual at the Postal Service directly to ensure that her understanding of the term is correct? If she does contact the Postal Service, obtains the answer she needed, and includes in her written summary analyzing the spreadsheet the fact that she obtained this clarification from the Postal Service, can the Commission rely on the information in preparing its Annual Compliance Determination? These questions are left unanswered in the Proposed Rules.

³³ Recommendation 2014-4 at 6.

To avoid chilling legitimate informal communications that the Commission apparently intends to continue to permit, the Postal Service suggests modifying Proposed Rule 3008.2 as follows. First, the Postal Service proposes that the Commission adopt the language it used in Proposed Rule 3008.6(a) to describe required actions upon receipt of an ex parte communication, and specifically define an ex parte communication in Proposed Rule 3008.2 as one “regarding the merits” of a matter before the Commission. Other agencies, such as DOJ and FERC, similarly limit application of their ex parte rules to communications addressing the merits of covered proceedings.³⁴

Second, the Postal Service suggests deleting the fifth category of communications that are exempted from the definition of “ex parte communications” under Proposed Rule 3008.2(b): “Communications not material to the matter before the Commission.” This exemption, which is not well defined in any event, would no longer be needed if ex parte communications were limited to those “regarding the merits.” Instead, Proposed Rule 3008.2(b)(5) would exempt questions intended to clarify or explain the meaning or operation of a statement, term, technical reference, or description of methodology used by the Commission (or by a participant in a proceeding), or to confirm the accuracy of the Commission’s (or participant’s) understanding or interpretation of it. A communication such as the one discussed above between the Commission analyst and the Postal Service staff member, relating to the meaning of a term used in a non-public folder, would then be permissible. If such a communication ultimately affected the outcome or decision-making in the proceeding,

³⁴ See 28 C.F.R. § 50.17(b)-(c) (DOJ); 18 C.F.R. § 385.2201(c)(4) (FERC).

then the Commission would simply disclose it on the record using the procedures outlined in Proposed Rule 3008.6(b).

Third, the Postal Service suggests adding a sixth category to the list of communications that are not considered “ex parte” under the proposed rules: “communications regarding general issues of domestic or international postal policy, postal operations, or other statutory responsibilities of the Commission not associated with the merits of contested proceedings identified in part 3008.1 of this chapter.” This proposed clarifying language, which is modeled on a similar provision included in the Nuclear Regulatory Commission’s regulations addressing ex parte communications,³⁵ is intended to cover both Consultations and Briefings (as defined in the internal PRC Policy), as well as other off-the-record communications between the Commission and the Postal Service or other potential stakeholders that do not pertain to the merits of a contested proceeding covered by ex parte restrictions. The proposed language is also consistent with legislative intent underlying the APA provisions addressing ex parte communications in formal agency rulemakings and adjudications. While of course not directly relevant to ex parte communications in *informal* agency proceedings (as to which the APA is silent), the legislative history indicates that even in *formal* agency proceedings Congress intended to continue to allow “background discussions about an entire industry” and “general information about an industry that an agency needs to exercise its regulatory responsibilities.”³⁶

³⁵ See 10 C.F.R. § 2.347(f).

³⁶ H.R. Rep. No. 94-880, pt. 1, at 20 (1976).

C. The Proposed Rules Should More Clearly Define When a Matter is “Before the Commission.”

Under the Proposed Rules, a matter will first be considered “before the Commission” when one of the following occurs: (a) upon the filing of a request for the Commission to initiate a proceeding, or the Commission noticing a proceeding, whichever is earlier; or (b) “at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed.”³⁷ The mere potential that a request *may* be filed does not trigger the ex parte restrictions; rather, an “affirmative action announcing, or actively preparing, an actual request with the intent to file within a reasonable period of time must be present.”³⁸

The Commission’s approach to defining when a matter is “before the Commission” creates uncertainty as to docket types that involve the filing of a periodically required report such as the Annual Compliance Report (ACR). Of course, the Postal Service “has knowledge” that every year, on or about December 29, it must (and in fact, it *will*) file an ACR analyzing its “costs, revenues, rates, and quality of service” and demonstrating that “all products during [the previous fiscal] year complied with all applicable requirements” of the PAEA.³⁹ The scope of information required to be included in the ACR is unquestionably broad, and could conceivably come up, for example, at a Consultation or Briefing with the Commission (discussed in Section II.B. above). Are the Postal Service and the Commission prohibited from *ever* having an off-the-record discussion about Postal Service costs, revenues, rates, or quality of service, by virtue of the fact that both entities know, without a doubt, that the Commission will

³⁷ Proposed Rule 3008.3(a)-(b).

³⁸ Proposed Rule 3008.3(c)(4).

³⁹ 39 U.S.C. § 3652(a)(1).

docket an ACR proceeding after the end of every fiscal year? Such a conclusion, which could effectively prevent nearly every off-the-record communication between the Postal Service and the Commission, illustrates the uncertainty that the draft rules create.

To avoid this result, the Postal Service suggests that the Commission simply delete Proposed Rule 3008.3(b) (and 3008.3(c)(4), which would then be unnecessary). The ex parte restrictions would be triggered only upon the filing of a request for the Commission to initiate a proceeding, or the Commission noticing a proceeding, whichever is earlier. This approach would create a bright-line rule that would be easier for the Commission to administer, and for parties to follow, than the proposed rule requiring a determination of when a party “has knowledge” that a proceeding is expected to be filed.

In the alternative, if the Commission believes it is necessary to retain these provisions, then the Postal Service suggests adding clarifying language to Proposed Rule 3008.3(c)(4), as follows (new language underlined):

(4) The mere potential that a request may be filed, or mere knowledge that a periodic report will be filed at regular intervals as required by statute or regulation, does not place a matter before the Commission. An affirmative action announcing, or actively preparing, an actual request with the intent to file within a reasonable period of time must be present.

D. The New Disclosure Requirements Should Provide for Protection of Sensitive or Confidential Information Submitted in an Ex Parte Communication.

One of the specific suggestions made in ACUS Recommendation 2014-4 is that agency ex parte policies should “explain how the agency will treat sensitive information submitted in an ex parte communication.” Even prior to formulating draft rules, agencies

are advised to consider “[t]he likelihood that protected information will be submitted to the agency through oral or written ex parte communications.”⁴⁰

The Commission’s proposed rulemaking does not explain how confidential or sensitive information will be treated when ex parte communications are required to be disclosed under Proposed Rule 3008.6(b). The Postal Service suggests that the Commission look to its existing procedures, allowing parties to apply for protection of non-public materials in matters before the Commission, in crafting a solution for this new context. For example, Proposed Rule 3008.6(a) already requires Commission decision-making personnel to advise a person making an ex parte communication relevant to the merits of a proceeding that the communication relates to a pending matter and may not be considered. As part of this notification, and prior to making the disclosure required by proposed Rule 3008.6(b), the Commission could advise the disclosing participant that it may apply for non-public treatment of any information protected from disclosure under applicable laws. Then, if the participant makes the requisite showing, the Commission would withhold the protected information from the public record of the communication and file it under seal pursuant to existing rules of Commission procedure. Suggested language is included in Appendix A to these comments.

E. The Proposed Rules Should Permit the Commission to Rely on Ex Parte Communications Where Certain Procedural Safeguards are Met.

Proposed Rule 3008.5(b) provides that Commission decision-making personnel “shall not rely upon any information obtained through ex parte communications.” While such a provision appears to be intended to disincentivize parties from engaging in

⁴⁰ Recommendation 2014-4 at 5-6.

prohibited ex parte communications, the Postal Service believes that the provision is both unrealistic and undesirable. Imagine, for example, that a public stakeholder unfamiliar with Commission practice – or even a frequent participant who is confused by the new rules – makes a statement to a Commission decision-maker that is highly relevant to the merits of a proceeding or could help shed light on a thorny issue on which the Commission has been seeking input. The statement may even appear in an online article or blog post that is publicly available to anyone who seeks it out, but outside the formal written record of the proceeding. Once information is learned, it is hard to unlearn, and if the information has merit and will help the Commission reach the right answer on a given matter, then it is unclear why it should not be included in the Commission’s analysis. The disclosure requirements included in Proposed Rule 3008.6(b) should help to ensure that all interested parties have an opportunity to rebut the information. Moreover, the fact that Proposed Rule 3008.6(c) would allow the Commission to “direct that the alleged factual assertion and the proposed rebuttal be disregarded in arriving at a decision” presupposes that in some circumstances, the Commission might decide to do the opposite, that is, to exercise its discretion to *consider* the information (plus any rebuttal evidence) in arriving at a decision.

To clarify the Commission’s rules in this regard, the Postal Service suggests that the Commission amend Proposed Rule 3008.5(b) as follows:

(b) Commission decision-making personnel may ~~shall not~~ rely upon any information obtained through ex parte communications in determining the merits of a proceeding only where the communications are made part of the record pursuant to part 3008.6(b), where an opportunity for rebuttal has been provided

pursuant to part 3008.6(c), and where reliance on the information will not cause undue delay or prejudice to any party.⁴¹

III. The Commission Should Revise its Proposed Rules and Internal Policy to Address the Concerns Raised in these Comments.

To assist the Commission in considering its suggested additions and clarifications to the proposed new rules, the Postal Service has included, as Appendix A to this filing, a “redline” version that tracks its suggested changes against Order No. 3005’s proposed rules. The Postal Service further recommends that the internal PRC Policy be amended to be consistent with these suggested changes and to address the concerns set forth in these comments.

CONCLUSION

For the foregoing reasons, the Postal Service respectfully requests that the Commission: (1) account for the Postal Service’s concerns and recommendations in promulgating any final rules concerning ex parte communications; (2) clarify certain provisions within the proposed regulations as described above and in Appendix A; and (3) amend its internal policy on ex parte communications to address the concerns articulated in these comments.

⁴¹ This proposed revision borrows language from the FCC’s procedures for handling prohibited ex parte communications, see 47 C.F.R. § 1.1212(d), and also incorporates by reference the Commission’s proposed procedures for disclosure and rebuttal of information included in an ex parte communication.

Respectfully submitted,

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**APPENDIX A TO UNITED STATES POSTAL SERVICE COMMENTS
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(February 29, 2016)

As described in its Comments on Proposed Ex Parte Communications Rules, filed today, the United States Postal Service (Postal Service) hereby submits this Appendix A noting its suggested revisions to the Commission's proposed rules regarding ex parte communications.

39 C.F.R. § 3000

AUTHORITY: 39 U.S.C. 503; 504, 3603; E.O. 12674; 54 FR 15159; 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 56 FR 42547, 3 CFR, 1990 Comp., p. 396, 5 CFR parts 2634 and 2635.

39 C.F.R. § 3000, Subpart B

§ 3000.735-501 Ex parte communications prohibited.

(a) The Commission maintains a written employee policy regarding ex parte communications applicable to all interactions, oral or in writing (including electronic), between Commission decision-making personnel, and the United States Postal Service or public stakeholders in regarding the merits of certain contested proceedings before the Commission. It is the responsibility of all Commission personnel to comply with this policy, including the responsibility to inform persons not employed by the Commission of this policy when required. The policy is available for review on the Commission's Web site at www.prc.gov.

(b) Additional ex parte communications requirements, applicable to specific docket types, are described in part 3008 of this chapter.

§ 3000.735-502 [Reserved]

39 C.F.R. § 3001, Subpart A

§ 3001.5 Definitions.

...

(o) [Reserved]

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§ 3001.7 [Reserved]

Part 3008—EX PARTE COMMUNICATIONS

Sec.

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Authority: 39 U.S.C. 404(d)(5); 503; 504; 3661(c); 3662.

§ 3008.1 Applicability.

(a) The rules in this section are applicable to the Commission proceedings identified in paragraphs (b) through (e) of this section.

(b) The nature of postal service proceedings conducted pursuant to 39 U.S.C. 3661(c).

(c) The appeals of Postal Service decisions to close or consolidate any post office conducted pursuant to 39 U.S.C. 404(d)(5).

(d) Rate or service complaints conducted pursuant to 39 U.S.C. 3662.

(e) Any other matter-contested proceeding in which the Commission, in its discretion, determines that it is appropriate to apply the rules of this section based on considerations of fairness or for other reasons, and provides notice on the public record of the proceeding that the rules of this section will apply (and the reasons therefor). For purposes of this section, “contested proceeding” means any docketed proceeding

before the Commission in which there are multiple adverse parties and/or disputed issues of fact, law or policy.

§ 3008.2 Definition of ex parte communications.

(a) Subject to the exceptions specified in paragraph (b) of this section, ex parte communications include all communications, oral or written (including electronic), between Commission decision-making personnel, and the Postal Service or public stakeholders regarding the merits of a matters before the Commission. For purposes of this section, a communication “regarding the merits” is one that is intended to affect, or capable of affecting the outcome of a proceeding, or intended to influence, or capable of influencing a Commission decision on any substantive issue in the proceeding.

(b) Ex parte communications do not include:

- (1) Documents filed using the Commission’s docketing system;
- (2) Communications during the course of Commission meetings or hearings, or other widely publicized events where the Commission provides advance public notice of the event indicating the matter to be discussed, the event is open to all persons participating in the matter before the Commission, and a summary of the event is provided for the record;
- (3) Communications during the course of off-the-record technical conferences associated with a matter before the Commission, or the pre-filing conference for nature of service cases required by § 3001.81 of this chapter, where advance public notice of the event is provided indicating the matter to be discussed, and the event is open to all persons participating in the matter before the Commission as a party, intervenor, or Public Representative;

(4) Questions concerning Commission procedures, the status of a matter before the Commission, or the procedural schedule of a pending matter, where these issues are not contested matters before the Commission; and

~~(5) Communications not material to the matter before the Commission.~~

~~(5) Questions or comments seeking to explain or clarify the meaning or operation of a statement, term, technical reference, or description of methodology used by the Commission or a participant in a proceeding, or to ascertain or confirm the accuracy of the Commission's (or participant's) understanding or interpretation of it; and~~

~~(6) Communications regarding general issues of domestic or international postal policy, postal operations, or other statutory responsibilities of the Commission not associated with proceedings identified in part 3008.1 of this chapter.~~

§ 3008.3 Definition of a matter before the Commission.

(a) A matter is before the Commission at such time as the Commission may designate, but in no event later than the earlier of the filing of a request to initiate a proceeding or the Commission noticing a proceeding.

~~(b) A matter is also before the Commission at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed.~~

~~(eb)~~ The following explanations apply:

(1) A matter is no longer before the Commission upon the issuance of the final order or decision in the docketed matter;

(2) A matter is again before the Commission upon the filing of a request for reconsideration. The matter remains before the Commission until resolution of the matter under reconsideration; and

(3) A matter is again before the Commission upon the remand of a Commission's final decision or order by an appellate court. The matter remains before the Commission until resolution of the matter under remand; and.

~~(4) The mere potential that a request may be filed does not place a matter before the Commission. An affirmative action announcing, or actively preparing, an actual request with the intent to file within a reasonable period of time must be present.~~

§ 3008.4 Definitions of persons subject to ex parte communication rules.

(a) Commission decision-making personnel include:

- (1) The Commissioners and their staffs;
- (2) The General Counsel and staff;
- (3) The Director of the Office of Accountability and Compliance and staff;
- (4) Contractors, consultants, and others hired by the Commission to assist with the Commission's analysis and decision; and
- (5) Any other employee who may reasonably be expected to be involved in the decisional process.

(b) The Postal Service includes all Postal Service employees, contractors, consultants, and others with an interest in a matter before the Commission. Any interaction between the Postal Service and Commission decision-making personnel concerning a matter before the Commission expresses an interest in the matter before the Commission.

(c) Public stakeholders include all other persons not previously described, with an interest in a matter before the Commission. This includes the Commission non-decision-making personnel identified in paragraph (d) of this section. Any interaction between a public stakeholder and Commission decision-making personnel concerning a matter before the Commission expresses an interest in the matter before the Commission.

(d) Commission non-decision-making personnel include:

- (1) All Commission personnel other than decision-making personnel;
- (2) Commission personnel not participating in the decisional process owing to the prohibitions of § 3001.8 of this chapter regarding no participation by investigative or prosecuting officers;
- (3) The Public Representative and other Commission personnel assigned to represent the interests of the general public pursuant to 39 U.S.C. 505 in the specific case or controversy at issue (regardless of normally assigned duties); and
- (4) Contractors, consultants, and others hired by the Commission to provide an independent analysis of issues before the Commission (and Commission employees assigned thereto).

§ 3008.5 Prohibitions.

- (a) Ex parte communications between Commission decision-making personnel, and the Postal Service or public stakeholders regarding the merits of a matter before the Commission are is prohibited.
- (b) Commission decision-making personnel shall not may rely upon any information obtained through ex parte communications in determining the merits of a proceeding

only where the communications are made part of the record pursuant to part 3008.6(b), where an opportunity for rebuttal has been provided pursuant to part 3008.6(d), and where reliance on the information will not cause undue delay or prejudice to any party.

(c) Paragraph (a) of this section does not constitute authority to withhold information from Congress.

§ 3008.6 Required action upon ex parte communications.

(a) Commission decision-making personnel who receive ex parte communications relevant to the merits of the proceeding shall decline to listen to such communications and explain that the matter is pending for determination. Any recipient thereof shall advise the communicator that the communication will-may not be considered, and shall promptly and fully inform the Commission in writing of the substance of and the circumstances attending the communication, so that the Commission will be able to take appropriate action.

(b) Commission decision-making personnel who receive, or who make or knowingly cause to be made, ex parte communications prohibited by this part shall immediately notify all participants that the communications will need to be disclosed on the public record, and provide an opportunity for the participants to apply for non-public treatment of any materials or information protected from disclosure under applicable law. Any such application shall be submitted to the Commission within five business days after notification. The Commission decision-making personnel shall then promptly place, or cause to be placed, on the public record of the proceeding:

- (1) All such written communications;

(2) Memoranda stating the substance of all such oral communications, including the names of all participants and the date(s) of such communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in (b)(1) and (b)(2) of this section.

(4) In placing information or materials in the public record under this part, the Commission shall withhold any non-public information that a participant in the communication has demonstrated is exempt from disclosure under applicable laws, and file the non-public information under seal pursuant to the procedures identified in its rules of practice and procedure.

(c) Commission decision-making personnel who receive, or who make or knowingly cause to be made, communications that are described in part 3008.2(b)(5) of this chapter shall follow the disclosure requirements set forth herein in part 3008.6(b) in the event that such communications affect the outcome of the proceeding or influence the Commission's decision on any substantive issue in the proceeding.

(ed) Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which have been placed on the public record of the proceeding pursuant to paragraph (b) of this section may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. In lieu of actually receiving rebuttal material, the Commission may in its discretion direct that the alleged factual assertion and the proposed rebuttal be disregarded in arriving at a decision.

§ 3008.7 Penalty for violation of ex parte communication rules.

(a) Upon notice of a communication knowingly made or knowingly caused to be made by a participant in violation of § 3008.5(a), the Commission or presiding officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the participant to show cause why his/her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Commission may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, consider a violation of § 3008.5(a) sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.